Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Petition for Rulemaking of Fibertech Networks, LLC	RM - _____ WCB - _____

PETITION FOR RULEMAKING OF FIBERTECH NETWORKS

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Introduction and Summary

In this Petition for Rulemaking, Fibertech Networks, LLC ("Fibertech") asks the Commission to foster continued construction of competitive last-mile facilities by adopting a set of "best practices" addressing competitor access to poles and conduit. Congress has twice recognized the critical nature of access of poles and conduit, explicitly mandating nondiscriminatory access to these essential facilities. Unfortunately, the current rules permit utilities, including incumbent local exchange carriers (ILECs), too much latitude to use pole and conduit processes to strategically delay competitors' deployment of services and impose unnecessary costs on new entrants.

Accordingly, Fibertech asks the Commission to adopt a series of best practices drawn from existing precedent and industry practice. Specifically, Fibertech asks the Commission to adopt the following standard practices for pole and conduit access:

1. **Allow use of boxing and extension arms where:**
    a. **such techniques would render unnecessary a pole replacement or rearrangement of electric facilities;**
    b. **facilities on the pole are accessible by ladder or bucket truck; and**
    c. **the pole owner has previously allowed such techniques.**
2. **Establish shorter survey and make-ready time periods.**
3. **Allow competitors to hire utility-approved contractors to perform field surveys and make-ready work.**
4. **Permit installation of drop lines to satisfy customer service orders without prior licensing.**
5. **Allow competitors to search utility records and survey manholes to determine availability of conduit, and limit charges if the utility performs these functions.**
6. **Allow utility-approved contractors to work in manholes without utility supervision.**
7. **Require ILECs to share building-entry conduit with CLECs.**

Adoption of these practices will allow and encourage continued construction of facilities-based alternatives to ILEC loops by Fibertech and other competitive carriers.

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PETITION FOR RULEMAKING OF FIBERTECH NETWORKS

Introduction

Pursuant to the Pole Attachment Act, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 224,[1] and 47 C.F.R. § 1.401, Fibertech Networks, LLC, ("Fibertech") respectfully submits this petition for rulemaking, requesting that the Commission establish rules that would make the failure of pole and conduit owners to provide access in accordance with certain "best practices" per se unjust and unreasonable. The rules proposed herein define those "best practices." *See* Appendix A. The current rules permit utilities, including incumbent local exchange carriers (ILECs), too much latitude to use pole and conduit processes to strategically delay competitors' deployment of services and to impose unnecessary costs on new entrants. Grant of this petition is essential to the ability of competitive carriers such as Fibertech to construct and offer facilities-based alternatives to ILEC loops.

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[1] Section 224(b) of the Pole Attachment Act grants the Commission the authority to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable" and to "prescribe by rule regulations to carry out the provisions of this section." 47 U.S.C. § 224(b).

Founded in June 2000, Fibertech is a leader in designing, installing and operating high capacity metro fiber-optic networks in the Eastern and Central United States. Fibertech is a fast-growing company that has already established local networks covering more than 3,300 route-miles and serving 18 U.S. metropolitan areas. *See* Declaration of Charles Stockdale ¶ 2 (Exhibit 1) ("Stockdale Decl."). Serving competitive local exchange carriers (CLECs), long distance carriers, and a growing list of enterprise customers, Fibertech employs an open-access, redundant network architecture to connect communications centers, businesses, schools, and government agencies. Fibertech's current and future operations – like those of any competitive provider of facilities-based communications services – are dependent upon non-discriminatory access to utility poles and conduit. *Id.*

Congress has twice recognized the critical nature of access to poles and conduit, explicitly mandating nondiscriminatory access. The Pole Attachment Act was first enacted in 1978, in recognition that cable television services could not be widely deployed without access to poles and conduit. In the landmark 1996 Act, Congress recognized that CLECs and other competitive communications providers would not be able to deploy their own facilities-based networks without access to poles and conduit. Congress therefore directed that utilities, including LECs and electric utilities, "shall provide . . . any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." *Id.* § 224(f)(1).[2] For LECs, Congress underscored the importance of access to poles and conduit by separately and

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[2] A utility can only deny access (1) "on a non-discriminatory basis," where (2) "there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." 47 U.S.C. § 224(f)(2).

expressly imposing upon all LECs the duty to provide "access to the poles, ducts, conduits, and rights-of-way of such carriers to competing providers of telecommunications services on rates, terms and conditions that are consistent with section 224." *Id.* § 251(b)(4).

The Commission's rules and precedents reiterate this principle of non-discrimination. *See* 47 C.F.R. § 1.1403(a). Quite simply, "a utility may not favor itself over other parties with respect to the provision of telecommunications or video programming services." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 16073 (¶ 1157) (1996) ("*Local Competition Order*") (addressing LECs' section 224 obligations).

Unfortunately, in Fibertech's experience, utilities have adopted a variety of practices – described in detail below – that do not meet this standard, and which unnecessarily constrain competitors' access to poles and conduit. Without access to poles and conduit (or when access is unreasonably delayed or subject to unwarranted costs) competitors cannot effectively deploy their networks and offer competitive alternatives to consumers. Because the seemingly humble pole and conduit are, in fact, the foundation of any modern network, and because existing rules and procedures have not prevented anti-competitive practices, the Commission should take the steps requested below to ensure full and fair access to these essential resources.[3]

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[3] In the *Local Competition Order*, the Commission properly recognized a need for a certain amount of flexibility in pole attachment and conduit arrangements, and thus adopted only general rules, supplemented by guidelines and presumptions, to attempt to ensure the non-discriminatory access mandated by section 224(f). 11 FCC Rcd. at 16067-68 (¶ 1143). The Commission also stated, however, that it would "monitor the effect of this approach and propose more specific rules at a later date if reasonably

Granting Fibertech's request is the natural next step in fostering facilities-based competition. In the *Triennial Review Remand Order*, the Commission recognized that some of the most significant costs incurred in deployment of fiber-facilities included obtaining the required access to poles, ducts, and conduit and "assume[d] for the purposes of th[at] discussion that existing conduit is available to competitive carriers that seek to deploy their own loop facilities." *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2616 n.419 (2005). The Commission also reiterated the appropriateness of addressing obstacles to facilities-based competition through specific statutory provisions like Section 224's non-discriminatory access requirement. *See id.* at 2546-47 (¶ 23) ("If rules other than those implementing section 251(d)(2) are impeding the development of competition . . . parties should seek redress of the problematic rules themselves, rather than attempt to tilt the unbundling framework to account for the asserted deficiency.") Acting on Fibertech's Petition will both assure the accuracy of the Commission's assumption with respect to pole and conduit access and demonstrate the Commission's continued commitment to effective and narrowly focused regulatory action.

With this petition, Fibertech calls upon the Commission to formalize a series of best practices. Fibertech does not ask the Commission to break new ground, as its proposals have largely been adopted by state commissions or fair-minded utilities and are

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necessary to facilitate access and the development of competition in telecommunications and cable services." *Id.* at 16068. The anti-competitive practices detailed throughout this petition, along with the emergence of the best practices described below, demonstrate that the time has come for the Commission to revisit, clarify, and build upon its existing rules and guidelines.

consistent with existing FCC rules and decisions. The requested rules are nonetheless necessary, as only wide and uniform availability of these protections will enable far-reaching network deployment. Further, existing Commission authority regarding access to poles and conduit, often contained in case law, can be difficult to locate, allowing utilities to raise and relitigate issues repeatedly to the detriment of new entrants and smaller companies not familiar with the body of pole attachment authority. The requested rules would allow the Commission and competitors to avoid costly and redundant litigation, provide clarity and certainty for the industry, conserve FCC and industry resources, and, most importantly, ensure the level playing field required to facilitate competition.

Accordingly, Fibertech respectfully petitions the Commission to adopt the following seven standard practices for pole and conduit access:

1. **Allow use of boxing and extension arms where:**
    a. **such techniques would render unnecessary a pole replacement or rearrangement of electric facilities;**
    b. **facilities on the pole are accessible by ladder or bucket truck; and**
    c. **the pole owner has previously allowed such techniques.**
2. **Establish shorter survey and make-ready time periods.**
3. **Allow competitors to hire utility-approved contractors to perform field surveys and make-ready work.**
4. **Permit installation of drop lines to satisfy customer service orders without prior licensing.**
5. **Allow competitors to search utility records and survey manholes to determine availability of conduit, and limit charges if the utility performs these functions.**
6. **Allow utility-approved contractors to work in manholes without utility supervision.**
7. **Require ILECs to share building-entry conduit with CLECs.**

Background

A brief review of pole and conduit access procedures and the current regulatory regime provides helpful context for the proposed rules.

Poles. To obtain a pole attachment, a CLEC generally must first submit an application to the pole owner (along with an application fee). When a pole owner receives the CLEC's application, a survey is conducted to see if any "make ready" work[4] is necessary to accommodate the attachment. *See* Stockdale Decl. ¶ 4. Pole owners often require that their own employees or contractors conduct the survey, and often require 45 or more days to complete the survey.[5] *Id.* The CLEC must pay the owner's and any joint user's estimated survey costs up front before the survey will be conducted,[6] and in most jurisdictions the CLEC can still be billed for any cost overruns.[7] In some states, however, the CLEC is permitted to do the survey itself, at its own cost and using utility-approved contractors, if the utility takes longer than a specified time. *Id.*

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[4] "Make-ready" work involves any work that must be completed to allow for the new attachment and may include the rearrangement of existing facilities, such as cables and electrical transformers, or the replacement of existing poles with larger poles.

[5] Sometimes pole owners will wait many months before completing a pole survey unless they are aggressively pressed to complete it sooner. *Id.*

[6] Poles can be jointly owned by the ILEC and power company or solely owned by one of these two entities. When one owns the pole, the other generally is accorded special treatment as a "joint-user" that may collect fees from third parties for surveys, may attach facilities without prior survey or even notice to the owner, and may impose on third parties seeking to attach to the pole construction standards (such as clearance requirements in excess of NESC requirements) applicable to its "space" on the pole (*i.e.* the power, or "supply," space for the power company and the communications space for the ILEC). *See id.* ¶ 3.

[7] In some states that regulate pole and conduit access, such as New York, pole owners are prohibited from seeking payment in excess of the amounts originally estimated and collected. *Id.*

Boxing and extension arms (or "extension brackets") are techniques used to limit make-ready work and facilitate quicker attachment. Boxing involves attaching wires on opposite sides of a pole in order to achieve the 12-inch separation between adjoining communications lines that is required by the National Electric Safety Code (NESC).[8] *Id.* ¶ 5. For example, if a pole lacks the full 12 inches of excess vertical space necessary to permit installation of a new cable on the side of the pole holding existing lines, boxing allows the new cable to be installed in compliance with the NESC requirements – without replacing the pole with a larger pole. Specifically, the new cable is installed on the opposite side of the pole between two existing communications lines or at least four inches above the highest existing communications line (assuming the new line thereby would also satisfy the required clearance from any electric facilities on the pole). *Id.*

Extension arms, or brackets, are devices that extend horizontally from a pole to support communications lines away from the pole face. Like boxing, this technique thereby permits the required 12-inch separation between communications lines to be achieved diagonally when insufficient pole space exists to allow it to be achieved vertically. *Id.* ¶ 6.

If "make-ready" work is necessary in order for the pole to accommodate a CLEC's proposed attachment, the CLEC generally is required to pay the utility's estimated costs before the utility will actually do the work. *Id.* ¶ 7. Although utilities

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[8] Because of the NESC standard requiring at least four inches between bolt holes drilled through a pole, a cable that is placed on the opposite side of a pole from existing cables and that is not attached to the back of a through-bolt holding one of those existing cables must be at least four inches (measured vertically) from any adjoining line. Due to competitive considerations, only entities that already have attachments on a pole generally are able to box the pole using the back of an existing through-bolt. *Id.* ¶ 5 n.1.

often complete such work quickly in deploying their own facilities, they regularly take six months or more to complete the make-ready work required for CLEC attachments if they are permitted to do so. *Id.* Some states, however, allow CLECs to use utility-approved contractors if the utility is unable to complete the work in a given timeframe. *Id.* If boxing or extension arms may be used, make-ready work is either reduced or becomes unnecessary. *Id.*

A CLEC generally must also obtain licensing approval prior to attaching.[9] *Id.* ¶ 8. Once licenses are issued, the attacher is permitted to install its facilities, in accordance with specifications issued by the pole owner or owners, by using any qualified workers. *Id.*

Conduit. To obtain access to conduit, CLECs must first determine whether and where space is available. Conduit owners typically make this determination by searching conduit records to locate empty and available conduit space that will satisfy the applicant's need and then entering manholes along the apparently available conduit route to visually confirm the availability of the space. *Id.* ¶ 9. CLECs trigger this process by filing an application and paying a fee to the relevant pole owner. *Id.* The fee is often based on estimated search and survey costs and can be adjusted upward after the search and survey have been completed. Some pole owners, however, do charge fixed fees for this work. *Id.*

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[9] On occasion CLEC's are permitted the privilege, which has traditionally been accorded cable television companies, of attaching a drop line to reach a customer location in order to satisfy a service order and applying for pole licenses for that line after installation. Typically, however, a CLEC's right to install such a drop line without first obtaining pole licenses is not recognized by the pole owners. *Id.* ¶ 8.

Assuming the record search and physical survey locate available conduit space, the conduit is "rodded and roped." *Id.* ¶ 10. Through this step, each section of conduit (the conduit between any two manholes on the route) is probed to determine whether it is clear or blocked. If the conduit is blocked, it is "slugged," a process whereby workers attempt to pull a stiff brush or other object though the conduit to dislodge any obstruction. *Id.* If slugging does not clear the conduit, the utility will typically provide the applicant with an estimated cost of excavating to determine the cause of the blockage and of fixing the problem. *Id.* The CLEC then can choose to pay the estimate (and commit to pay any additional costs in excess of the estimate) or apply for conduit along another route. *Id.* If the conduit is clear, or after any obstruction is removed, the next step is the installation of innerduct to divide the conduit space into several smaller, protected channels.[10] *Id.* Three innerducts typically are installed in a four-inch-diameter conduit. Generally, the rodding and roping, the slugging, the diagnosis and repair of blockages, as well as the installation of innerduct are all considered elements of make-ready work for underground installations. *Id.* Once innerduct has been installed, the CLEC applicant is assigned an innerduct, and it may then install its cable. *Id.* Where every innerduct within a conduit is occupied, a cable can be pulled through the interstices of the innerducts, which will not endanger the existing cables contained within the innerducts. *Id.* ¶ 11.

Based on Fibertech's experience, utilities typically insist on using their own employees or contractors to perform underground make-ready work. *Id.* ¶ 11. ILECs

[10] The Commission's regulations define an innerduct as "a duct-like raceway smaller than a duct ["duct" and "conduit" are synonymous for these purposes] that is inserted into a duct so that the duct may carry multiple wires or cables." 47 C.F.R. §1.1402(n).

will allow CLECs to employ ILEC-approved contractors to pull the CLEC cable through the assigned innerduct and sometimes to install the innerduct, but they often prohibit CLEC-hired contractors from doing even this work unless they are supervised by ILEC personnel.[11] *Id.* ILEC's generally charge the CLEC for supervising the work of the CLEC-hired (and ILEC-approved) contractor.[12]

Current Regulatory Regime and Practice. The Commission's current rules require that pole owners provide non-discriminatory access to poles and conduit on just and reasonable terms. Absent Commission or state standards affirmatively addressing an issue, however, the terms and conditions for how a competitor can obtain pole and conduit access are set through contracts imposed by the pole owner.[13] *Id.* ¶ 12. And any disputes that arise as to whether practices are just, reasonable, and non-discriminatory

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[11] It is highly preferable, from the CLEC's perspective, to be the entity that hires the contractor. When it - rather than the ILEC - hires the contractor, the CLEC can negotiate the price for the work and, unless encumbered by an ILEC rule preventing work outside the presence of ILEC supervisors, can dictate the scheduling and pace of the work. Stockdale Decl. ¶ 11.

Among power companies with which Fibertech has dealt, only Rochester Gas & Electric ("RG& E") has allowed Fibertech or Fibertech's contractors to perform work in its electric manholes. Fibertech employees who have been trained by RG&E are allowed to work in RG&E's manholes to install both innerduct and fiber-optic cable. The ability of Fibertech employees to perform such work in RG&E manholes is not conditioned on the presence of any representative of the utility. *Id.* ¶ 11 n.2.

[12] It is Fibertech's understanding that, although an ILEC may require that an ILEC supervisor be present whenever contractors perform underground work for CLECs and will charge the CLEC for that supervision, ILECs do not typically assign personnel to supervise those very same contractors when they are working on behalf of the ILEC.

[13] In *Southern Company Services, Inc. v. FCC*, 313 F.3d 574 (D.C. Cir. 2002), the Court recited approvingly the Commission's description of pole attachment "agreements" as documents by which "the utility gives nothing of value in exchange for the attacher's coerced 'agreement' to accept unreasonable or discriminatory access." *Id.* at 583 (quoting FCC brief).

must be resolved through a post-hoc complaint process.[14] *Id.* As a result, enforcement of the Commission's current rules is both time consuming and resource-intensive.

Under the current rules, pole and conduit owners have imposed unreasonable terms and conditions on CLECs seeking to deploy competitive facilities. *See id.* ¶ 13. The following practices are typical:

- Pole owners have prohibited CLEC use of boxing and extension arms to eliminate make-ready work and enable faster attachment at lower cost.
- Utilities have not granted CLECs access to poles or conduit (or specified the prerequisite make-ready work) within the 45 days required by the Commission's rules. *See* 47 C.F.R. § 1.1403(a) &(b).
- Utilities have blamed various pole and conduit access delays on manpower shortages, but have not permitted CLECs to use approved contractors to perform necessary surveys and make-ready work.
- Pole owners do not officially permit pre-licensing extension of drop lines, forcing CLECs to choose between deploying facilities in advance of demand or risking delay in providing service once it has been ordered.
- ILEC record searches and manhole surveys are often inaccurate, take an unreasonably long time to complete, and give rise to exorbitant fees.

[14] *See* 47 C.F.R. §§ 1.1404-14. In practice, disputes between pole owners and CLECs over access to poles and conduit often include litigation in state court, where the ILEC or power company seeks to enforce the one-sided terms of the pole attachment "agreement" signed by the CLEC, and the CLEC seeks to persuade the court to defer to the Commission's complaint process. Stockdale Decl. ¶ 12.

- ILECs require ILEC supervision (at CLEC cost) of ILEC-approved contractors performing work in manholes when these contractors are working for CLECs.
- ILECs deploy fiber in building-entry conduit without using innerduct, thereby precluding CLECs from using the conduit.

All of these practices impose unnecessary delays and unwarranted costs on Fibertech and similarly situated companies.

These delays have significant competitive consequences. For example, when competing to provide service to a new enterprise customer, a CLEC must commit to a date by which facilities will be available. *Id.* ¶ 14. Given the substantial uncertainties surrounding whether and when access to poles and conduit will be provided, however, it is difficult for a CLEC to make the necessary commitment. *Id.* These delays give ILECs a significant advantage when bidding for enterprise customers. Moreover, charges for access to poles and conduit provide a ready means for pole owners to raise the costs of actual or potential rivals. These charges are difficult to resist, as pole owners often will not perform necessary surveys or make-ready work without advance payment, and CLECs cannot offer services until after those tasks are completed. *Id.*

Disputing these delays and charges through the complaint process, either at the FCC or, in those states that regulate access to poles and conduit, before the state PUC, is itself a costly and time-consuming process. *Id.* ¶ 15. Moreover, because the results of these individual adjudications are neither centrally available nor codified, rulings on pole and conduit access can be difficult to locate and enforce even though the issues resolved often recur. *Id.*

I. The Commission Should Require Pole Owners to Permit Use of Boxing and Extension Arms in Appropriate Circumstances.

Prior to the Telecommunications Act of 1996, ILECs commonly used boxing and extension arms to save time and reduce costs when adding facilities to existing poles. Since the passage of the 1996 Act, however, pole owners, including Bell Atlantic, largely have prohibited the use of such techniques, imposing unnecessary delays and costs on competitors seeking to deploy wireline facilities. *See* Stockdale Decl. ¶ 16. Even if such prohibitions on boxing and extension arms were, on their face, applied non-discriminatorily to all pole occupants, their effect would be plainly discriminatory. Because incumbent communications companies in most cases can readily deploy new cables by overlashing them to existing support strand, the prohibition disadvantages only new entrants to the market, who must find new pole space. *Id.* Thus, a prohibition on boxing and extension arms – even if applied to all pole occupants – creates a barrier to entry that hinders facilities-based competition.

To remedy this, the FCC should adopt a rule requiring utilities to allow the use of boxing and extension arms where (1) such techniques avoid pole replacement or make-ready work involving electrical facilities (generally the most expensive and time-consuming types of pole work); (2) the facilities on the pole can be safely reached by a ladder or bucket truck; and (3) the pole owner has previously allowed use of the technique. Together, these conditions permit the efficient use of such techniques and eliminate any competitive disadvantage to new entrants, without compromising safety and reliability.

Taking the requested steps would simply formalize (and therefore make available to all comers) a practice that has been endorsed by the Commission, state commissions,

and utilities. To begin with, the proposed rule is consistent with FCC precedent. *See Cavalier Telephone, LLC v. Virginia Electric and Power Company*, Order and Request for Information, 15 FCC Rcd 9563, 9572 (¶ 19) (2000) ("*Cavalier Telephone Order*"). In that case, the complainant alleged that the respondent refused to allow its competitors to use extension arms and boxing, even though the respondent itself used the same techniques. Addressing those allegations, the FCC explained that a utility must " 'take all reasonable steps to expand capacity to accommodate requests for attachment just as it would expand capacity to meet its own needs;'" and " 'explore potential accommodations in good faith with the party seeking access.'" *Id.* Applying that non-discrimination principle, the FCC made clear that if "[r]espondent uses extension arms and boxing for its own attachment" it "must allow other attachers to do the same." *Id.* In addition, the FCC held that "[r]espondent must cease and desist from selectively enforcing safety standards or unreasonably changing the safety standards to which [c]omplainant must adhere." *Id.*

States have adopted rules similarly supporting the use of boxing and extension arms. Connecticut regulations expressly allow the use of these techniques, and SBC in Connecticut regularly directs Fibertech to place cables on the field side of its poles (*i.e.,* to box the poles). *See* Connecticut DPUC § 16-333-16a and Appendix A, Plates 2, 4, and 6 (Exhibit 2). The availability of these techniques has played a significant role in enabling Fibertech to deploy over 1,300 route-miles of fiber-optic cable in Connecticut since 2001. *See* Stockdale Decl. ¶ 17.

Fibertech's proposed rule largely tracks the model established by the New York Public Service Commission ("New York PSC"), which recently issued an order and policy statement on pole attachments establishing set criteria to govern the use of boxing

and arm extensions. *See Proceeding on Motion of the Commission Concerning Certain Pole Attachment Issues,* Order Adopting Policy Statement on Pole Attachments, Case 03-M-0432, at 5 (Issued and effective Aug. 6, 2004) ("*New York Order*"") (Exhibit 3). Specifically, the *New York Order* allows boxing where (1) it would allow companies to avoid exorbitant make-ready costs; (2) the pole can be safely accessed by ladders, bucket trucks, or emergency equipment, so that worker safety is not compromised; and (3) the utility allows boxing.[15] The *New York Order* also allows the use of extension arms where (1) make-ready costs are otherwise exorbitant; and (2) use of the arms allows for safe and reliable attachments. *Id.* at 5-6. For permanent extension arms, Fibertech interprets the "safe and reliable attachments" criteria as imposing conditions like those established for boxing, *i.e.*, allowing extension arms where the pole can be reached by ladder or bucket truck and the arm therefore will not obstruct worker access to pole facilities.[16]

Finally, the requested action is consistent with historical and current industry practice. Verizon, for example, has made frequent use of both boxing and extension arms in its current efforts to expeditiously deploy fiber-optic cable. *See* Exhibit 4 (photographs of Verizon fiber deployment using boxing and extension arms). This experience demonstrates that boxing and extension arms are both safe and feasible.

Blanket prohibitions on these techniques therefore have anticompetitive effects – increasing rivals' costs through added expense and delay – without countervailing public

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[15] In order to ensure the practical effectiveness of the boxing relief contemplated by the *New York Order,* Fibertech has petitioned the New York PSC for clarification that the third criterion includes instances where the utility has historically allowed boxing.

[16] To parallel the boxing criteria, Fibertech proposes the additional criteria that extension arms should be allowed where the utility previously has used them or allowed their use.

safety benefit. Accordingly, a categorical denial of the use of boxing and extension arms by a utility is unreasonable. Instead, these practices should be expressly permitted by rule whenever (1) they avoid pole replacement or costly make-ready work (2) the facilities on the pole can be safely reached; and (3) the pole owner has previously allowed their use.

II. The Commission Should Establish Shorter Survey and Make-Ready Time Periods.

The FCC's current rules require that a utility grant access to poles and conduit within 45 days of a request for access[17] and that make-ready work be completed within timeframes that are both nondiscriminatory and reasonable.[18] Utilities, however, often delay access by failing to perform even field surveys within 45 days, and then failing to complete the make-ready work necessary to permit access to poles for four or six months (or longer) after a competitor has paid for the work. Stockdale Decl. ¶ 18. Pursuant to pole attachment "agreements" like Verizon's in New England, for example, pole owners currently are only required to commit to complete make-ready work within 180 days of payment, and may take even longer. *Id.* Yet ILECs act much more quickly when installing their own new facilities, thereby achieving an unfair advantage in the competition to sign up customers for fiber-delivered services. *Id.* By failing to perform the surveys and make-ready work required for competitors' attachments in a timely

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[17] *See* 47 C.F.R. §1.1403(b). If access is not granted, the utility must issue a written denial specifically explaining how and why access is denied for reasons of lack of capacity, safety, reliability, or engineering standards. *Id.*

[18] *See* 47 U.S.C. §§ 224(b)(1), (f)(1); 47 C.F.R. § 1.1403.

manner, pole owners reap an unfair competitive advantage.[19] These lengthy delays should now, by rule, be declared per se unreasonable practices that violate sections 224, 251 and 271.

To correct this, the FCC should require utilities to complete (or allow licensee-hired contractors to complete) field surveys and identification of any necessary make-ready work within 30 days of receipt of a complete application and to finish make-ready work within 45 days of receiving payment for the work. This will foster fair competition by ensuring that new entrants are able to serve customers roughly as quickly as incumbents.

This approach would not break new ground. The recent *New York Order* addressed this issue, requiring pole and conduit owners to complete field surveys within 45 days of receiving a complete application and to complete make-ready work within 45 days of payment for such work. *New York Order* at 3. As the New York PSC recognized, the timeframe for attaching to poles is critical because "[w]ithout timely attachments [competitors] are unable to serve new customers and will lose business." *Id.* Accordingly, New York adopted deadlines designed to ensure that ILECs take action on CLEC requests as quickly as on their own.

Fibertech urges the Commission to adopt a similar approach and amend current rule 1.403(b) to (1) shorten the time allowed for completing the process of surveying poles or conduit and determining necessary make-ready work; and (2) establish a

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[19] To the extent that electric companies are offering or may offer broadband or other communications services, they, like ILECs, help ensure their own business success when they delay or prevent installation of competitive fiber-optic facilities or impose unnecessary costs on competitive providers.

reasonable time limit for completion of required make-ready work. In particular, Fibertech believes that 30 – not 45 – days are sufficient to complete field surveys and reach determinations as to what make-ready work is necessary and that the 45-day period for performance of the make-ready work adopted by the New York PSC is sufficient to allow completion of any required work. Such time periods would help ensure the CLECs receive nondiscriminatory access. Indeed, ILECs typically do not wait 45 days before commencing their own construction, and they pursue such construction expeditiously when it is for their own business purposes. *See* Stockdale Decl. ¶ 18. Moreover, such shorter deadlines are eminently reasonable: adoption of the boxing and extension arm practices described above can be expected to reduce the amount and complexity of required make-ready work, enabling pole owners to readily meet the suggested deadlines.

III. The Commission Should Require Utilities to Allow Approved Contractors to Perform Field Surveys and Make-Ready Work.

To attempt to justify lengthy and discriminatory delays in conducting field surveys and make-ready work, pole and conduit owners often claim that they lack the necessary manpower to perform these functions more quickly. *See* Stockdale Decl. ¶ 19. Under current rules, CLECs can counter these assertions only by filing a complaint against pole and conduit owners. Given the time necessary to resolve any complaint, this remedy offers CLECs little practical relief. Even if the CLEC is eventually successful in rebutting the owner's claim, it must expend considerable resources to litigate the dispute, and, more importantly, must forgo construction for the duration of the often-lengthy regulatory proceedings. *Id.*

The Commission can provide true relief for CLECs and reduce the need for regulatory intervention by adopting, instead, rules that give CLECs limited rights to

remedy undue utility delays. Specifically, the Commission should require pole and conduit owners to allow competitors to hire owner-approved contractors to perform field surveys, make-ready determinations, and make-ready work if the owner cannot or will not meet the relevant legal deadlines. Such a rule would help ensure non-discriminatory access while minimizing the need for regulatory oversight through the resource-intensive complaint process.

The New York PSC recently adopted such a requirement. Specifically, the *New York Order* provides that, if a utility is unable to complete a pole or conduit field survey (using its own employees or a contractor) in a timely manner, the license applicant is entitled to hire a contractor (from among a list of utility-approved contractors) to perform the survey.[20] Similarly, license applicants are entitled to use approved contractors to perform aerial make-ready work and to prepare communications conduit for occupation by installing innerduct if the pole or conduit owner would otherwise be unable to meet the deadline for completing such make-ready work (45 days after the licensee pays the make-ready estimate). *New York Order* at 3. As the New York PSC explained, "[s]ince time is the critical factor in allowing Attachers to serve new customers, it is reasonable to require the utilities either to have an adequate number of their own workers available to do the requested work, to hire outside contractors themselves to do the work, or to allow Attachers to hire approved outside contractors." *Id.*

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[20] *New York Order* at 3. This right does not apply in the case of electric company-owned conduit entering manholes that contain electric cables. Fibertech nevertheless believes it is reasonable to establish a CLEC right to hire utility-approved contractors to perform surveys and make-ready work even in manholes containing electric facilities, because any contractors approved for such work by electric companies necessarily will be capable of performing such work competently and safely.

The Illinois Commerce Commission ("ICC") imposed a similar condition in the context of a section 252(b) arbitration, requiring SBC to permit AT&T to use contractors with the same qualifications as SBC workers to perform make-ready work. The ICC found that:

> The delay in completing work in a reasonable time can affect AT&T's ability to compete. . . . If SBC is unable to meet the requested completion date, AT&T will have the option of performing the Make Ready Work to meet the requested completion date.

Arbitration Decision, AT&T Communications of Illinois et al. Verified Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company (SBC Illinois) Pursuant to Section 252(b) of the Telecommunications Act of 1996, Arbitration Decision, ICC Docket 03-0239, at 110-111 (Issued August 26, 2003).

The proposed rule, moreover, is consistent with the Commission's prior statements prohibiting pole owners from requiring attaching parties to use the pole owner's workers. In its *Local Competition Order* the Commission established that "[a] utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access will be able to use any individual workers who meet these criteria." *Local Competition Order*, 11 FCC Rcd. at 16083 (¶ 1182). The Commission subsequently made clear that this policy extends to "individuals who will work attaching or making ready attachments of telecommunications or cable system facilities to utility poles" *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Reconsideration, 14 FCC Rcd 18049, 18079 (¶ 86) (1999) (citing *Local Competition Order*, 11 FCC Rcd. at 16083 (¶ 1182)).

Because time is of the essence for competitive facilities-based deployment, utility delays in completing surveys and make-ready work disadvantage competitors, even if a delay is due to a shortage of manpower. The proposed rule removes any such anticompetitive effects by making clear that if a pole owner cannot complete work in a timely manner, it must allow a CLEC to use qualified personnel to do the work.

IV. The Commission Should Require Utilities to Permit Installation of Drop Lines Without Prior Licensing.

Costly and time-consuming pre-service licensing and approval processes constitute a substantial barrier to entry for CLECs seeking to provide a competitive alternative to ILEC services (including special access) over their own last-mile facilities. ILECs, in contrast, do not need to pursue these licensing processes or incur the associated costs. Imposing more onerous terms on a CLEC than the ILEC faces for its own operations creates an unnecessary barrier to entry, and can preclude CLECs from offering service to some customers. To allow CLECs to compete on a more equal footing, the FCC should establish a licensing exemption for the installation of drop lines to serve new customers.

The Commission's rulings in the context of the cable television industry's efforts to effectively reach customers provides analogous precedent for a less onerous, more competition-friendly process for licensing drop cables. *See Mile Hi Cable Partners et al. v. Public Service Company of Colorado*, Order, 15 FCC Rcd 11450, 11460-61 (¶ 19) (2000) (noting the cable operator's argument that "time constraints ... and the delays inherent in the application process for attachments, make it unreasonable to include drop poles in the regular applications process" and concluding that "[f]or drop poles, therefore, notification to [the pole owner] of [the attacher's] use of a drop pole is reasonable but

[the attacher] need not wait for approval prior to attaching"). Cable television companies traditionally have been permitted to attach drop lines (coaxial cable without steel support-strand) to utility poles (using "J-hooks" rather than through-bolts) without first obtaining a license, when necessary to satisfy a specific request for service. *See* Stockdale Decl. ¶ 20.

The attachment of CATV drop lines to utility poles generally occurs under one or more of three circumstances: (1) when the customer's house is so far from the road that the drop line must be attached to one or more poles located between the road and home; (2) when distribution poles line both sides of the street (typically ILEC poles on one side and electric company poles on the other), the customer's home is across the street from the CATV distribution line, and the drop line therefore is run across the street to a distribution pole and then to the house; and (3) when the customer's home is located inside the boundary of the franchise service area but slightly beyond the terminal point of the cable company's distribution line, so that the drop line must be attached to one or more poles along the roadway in order to reach the residence. *Id.* In each of these scenarios, once the drop line is installed, the cable company notifies the pole owner so that the owner can inspect the installation if it so chooses and can commence billing to collect the pole attachment rental fees.[21] *Id.* These policies, which protect pole owners

[21] In the cable context, these attachments without prior notice to the pole owners are accepted by the pole owners in part because they are essential to the ability of the cable companies to satisfy customer orders. Cable television service would be a far less attractive (and competitive) option if consumers were forced to wait six-to-eight months after placing an order before receiving service. The installation of drop lines without prior licensing also is permitted because the absence of either steel support-strand (which places stress on a pole) or through-bolts (which can affect the structural integrity of a pole) renders NESC-compliant drop-line installations free of the risks that pole-owner